

STATE OF VERMONT
DEPARTMENT OF EDUCATION



Special Education Due Process

Docket Number DP 09-16 [REDACTED]

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Nature of the Case

The Parent filed for due process on June 16, 2009 alleging that the Individualized Educational Program (IEP) offered by the Windsor Central Supervisory Union (District) for the 2009-2010 school year failed, both procedurally and substantively, to provide a free, appropriate, public education (FAPE) to the student. In particular, the Parent maintains that the District did not adhere to the procedural requirements in developing the IEP, which led to a denial of FAPE. The Parent also alleges that the IEP fails substantively in that it does not meet the student's educational needs. The Parent requests that the District pay for an educational placement at an independent school for the 2009-2010 year.

The District maintains that it followed the necessary procedures in developing the IEP and that if it did commit any procedural errors, they were harmless. The District submits that the IEP in issue, which envisions placement at the Woodstock Union Middle School, is appropriate, meets the student's needs and offers FAPE in the least restrictive environment (LRE).

The hearing took place on August 27 and 28, 2009 in Woodstock, Vermont. Attorney Gregory Van Buiten represented the Parent. Attorney Heather Thomas Lynn represented the District. The Parent presented her case on August 27th and the District presented its case on August 28th. The following witnesses testified during the Parent's case: the Parent, Thomas Ehrenberg (student's therapist) and Bruce Rosow (Academic Dean of The Greenwood School).

The District called Jan Winslow (Case Manager), Thomas DeBalsi (Director of Instructional Support Services), Sherry Newberry (Integration Facilitator and Director of Learning Opportunities), Dana Scott (Title One Instructor) and Dana Peterson (Principal). The parties submitted voluminous documentation.

There is no dispute that this student has special learning needs as defined by 20 U.S.C. § 1401 et seq. and is entitled to receive a free, appropriate public education. The issues presented here are whether the 2009-2010 IEP was appropriately developed and whether it is reasonably calculated to provide FAPE. The following findings of fact and decision are based on the affidavits, stipulated facts, joint exhibits, exhibits by the parties and the evidence adduced through testimony at the hearing.

Findings of Fact

- 1) The student is 12 years old (DOB 4/10/1997) and will be in seventh grade for the 2009-2010 school year. (Parties' Stipulated Facts)
- 2) The student has a Specific Learning Disability in written expression, reading fluency and math calculation. The student also has an Other Health Impairment, medically diagnosed as Attention Deficit Disorder (ADD). (District/Core/496,497/Disability Determination)
- 3) The student meets the special education eligibility requirements under the disability category of Specific Learning Disability and other Health Impairment. (District/Core/504/ Decision Regarding Eligibility)

Kindergarten Through Third Grade 2002 - 2006

- 4) Teachers first noted concerns about the student in kindergarten and referred him for an Occupational Therapy screening regarding his fine motor skills and poor handwriting. (Parties' Stipulated Facts)

- 5) During his first and second grades the student lagged behind in reading and worked with a remedial reading teacher. (Parties' Stipulated Facts)
- 6) In second grade the student had an occupational therapy evaluation and an assessment by the special education coordinator for the Woodstock Elementary School. The student was below age equivalent in most of the areas tested and had difficulty in his ability to remain focused and on task. (Parties' Stipulated Facts, District/Core/Evals/007/Reading Evaluation Report)
- 7) In January 2005, the results of a comprehensive evaluation conducted by the Stern Center for Language and Learning confirmed that the student had significant weaknesses in specific areas of language processing supporting a diagnosis of the specific developmental reading disorder commonly known as dyslexia. (District/Core/Evals/17/Comprehensive Diagnostic Evaluation)
- 8) It was during second grade when the student first began to exhibit signs of low self-esteem, frustration and negativity concerning school. The student was found eligible for special education based on a Specific Learning Disability in the area of basic reading. (Parent's Testimony, District/Core/004/February 16, 2005 IEP Meeting Minutes)
- 9) In third grade the student began to experience greater stress related to the expectation that he read more independently and due to the expectations related to writing. He started to refuse to get ready for school in the mornings and would refuse to get out of the car when he arrived at school. He shut down when the teachers tried to find out what was bothering him. (District/Core/Evals/50/Dr. Imber report)
- 10) The student's anxiety around school increased in third grade. He would frequently express how much he hated school and that no one understood how hard it was for him. The student began seeing a therapist for school related issues. (Parent testimony)
- 11) In November 2005 (third grade), an occupational therapy evaluation confirmed the student had sensory defensiveness that exhibits as visual distraction and overreaction to painful

stimuli at home and school. If stimulation continues, a period of over-load or “shutdown” may follow. Shutdown occurs when the central nervous system can no longer handle the incoming information. (District/ Core/ Evals/ 31/Philo Center Evaluation Report)

- 12) By third grade, the student had developed a very negative attitude toward himself as a learner. He began to notice differences between his abilities and those of his peers. He would refer to himself as “stupid” because he received help at school when others did not. He struggled with homework and would “shut down” and refuse help from his Parent. (Parent testimony, District/Core/Evals/52/Dr. Imber Evaluation)
- 13) The student has significant weaknesses in his working memory. A deficiency in mental control involving processing of complex information makes it more time-consuming for the student to process information as compared to his peers. As a result, his mental energies are more quickly drained than other children his age, resulting in more frequent errors on learning tasks. (District/ Core/ Evals/ 40/Dr.Cable Evaluation Report)
- 14) The student has fewer emotional resources available to him than most young people his age. He attempts to maintain equilibrium by shutting out situations and thoughts, which are disturbing to him. When the stress in his environment is low, or when he is able to avoid new or challenging situations, he functions without difficulty. However, when the stress in his environment increases, or he is faced with a situation he cannot easily avoid, he is at risk of becoming frustrated and quickly overwhelmed. *His tendency to shut down in response to academic tasks is an example of his attempts to protect himself and regain emotional control in a situation where he feels helpless or overwhelmed to meet the demands of a task.* (District/Core/Evals/41/ Dr. Cable Evaluation Report)
- 15) The student’s frequent outbursts and tendency to shut down relate to his frustration at learning and the lack of sufficient structure and academic support. His lack of sufficient resources to deal with this stress results in a shutting down and a withdrawal from others. His refusal to accept help at these times is an attempt to preserve self-esteem and regain emotional equilibrium. This pattern has been reinforced by the failure of adults in his

learning environment to also recognize the nature of his difficulty and provide adequate support for him to be consistently successful. (District/Core/Evals/42/Cable Evaluation Report)

- 16) Dr. Steven Imber completed a psycho-educational assessment of the student in February of 2006; the student was in third grade. The results showed that the student was functioning at least one year below grade level (and some tests suggested lower) in most reading skills. (District/Core/Evals/83 Dr. Imber Report)
- 17) The student has serious processing deficits in visual and auditory recall when written response is required. His listening skills with oral response are also an area of weakness. The student "presents some very challenging processing deficits that are adversely affecting his educational performance." (District/Core/ Evals/87/Imber Report)
- 18) While the student had a very positive relationship with his general education teacher, he was not experiencing success in school and he felt he did not have the ability to achieve academically. (District/Core/Evals/87/Imber Report)
- 19) On February 17, 2006 the IEP team met to conduct the annual review of the IEP. Dr. Imber attended and expressed concern about "the degree of [the student's] ability to do the work he is asked to do. The minutes of the meeting note that the student "feels that people don't think that he tries hard enough. We need to be sure that he can do what we are asking him to do." (District/Core/026/February 17, 2006 IEP Meeting Minutes)
- 20) In March of 2006 the student began taking medication for ADD. (District/Core/Evals/100)
- 21) On May 10, 2006 the District requested an evaluation to determine, among other things, whether the student's learning difficulties were neurologically based, how his attentional deficit impacts his academics and organization and how he processed information. Dr. Claudia Gibson, a child neurologist, completed the evaluation on May 30, 2006. (District/Core/040/Disability Determination)

- 22) The student experiences “slowness or difficulty when having to make quick changes in cognitive processes – *he is less fluid* about using the cognitive abilities he has. It’s subtle...but it does affect one’s sense of accuracy and one’s confidence during tasks that require rapid shifts of perspective, of cognitive approaches or techniques (this happened all the time in standardized testing).” The student met the educational designation of Other Health Impaired, on the basis of his linked attentional issues and motor association deficits leading to dysgraphia. (District/Core/Evals/107,110, Dr. Gibson Report)

Fourth Grade and Fifth Grade 2006-2008

- 25) In February of the fourth grade year, the student returned to the Stern Center for a comprehensive evaluation. The Parent wanted information to ensure he could meet the demands of fifth grade; she was concerned by the student’s response to school. The evaluation focused on the student’s current learning profile, his progress and what changes to his program might help him progress as he approaches the demands of middle school. (District/ Core/ Evals./114/Stern Center Comprehensive Diagnostic Evaluation Report)
- 26) While he appeared at times to make progress in reading, he continued to struggle with homework. He was easily overwhelmed by what he considered the amount of work he was asked to do. He would shut down and not respond when feeling frustrated and fatigued. (Id at 116)
- 27) The student’s NECAP scores were not at the proficient level. (District/Core/066/March 13, 2007 IEP Meeting Minutes)
- 28) In the spring of fourth grade, the student began to verbalize how much he hated school and how he was simply unable to do the work. He would not or could not complete his homework. There were hours of tears and crying at home on a regular basis. In addition, the student’s friends began to tease him for his struggles in reading. The student refused to attend

school and was absent on several occasions due to his refusal to attend. He would then go back to school and try to “rally.” (Parent Testimony)

- 29) On May 8, 2007 the IEP team met for a review of the IEP. The Parent expressed concerns about the amount of time during which the student received reading and writing instruction, 45 minutes, five times a week. The team discussed that it was a long time for him to receive services and that he returned to the classroom exhausted. The team noted how the student “shut down.” The team learned at this meeting, from the Parent’s lay advocate, that the Parent thought his program was inappropriate. (District/Core/069/May 8, 2007 IEP Meeting Minutes)
- 30) Concerned about the student’s experience at Woodstock Elementary School, the Parent visited The Greenwood School, an independent school designed for students with specific learning disabilities and other health impairment, to see if that program would meet the student’s needs. After meeting with the staff and touring the school, she left believing that the student’s educational needs could be met at Greenwood. The Parent did not want the student, however, to leave home to attend school. The Parent wanted a program that would meet the student’s needs in the local public school. (Parent testimony, Ehrenberg testimony)
- 31) At the end of fourth grade, the student began working with a licensed mental health counselor, Thomas Ehrenberg. Mr. Ehrenberg specializes in working with students who have learning disabilities. The Parent retained Mr. Ehrenberg because of her concerns about the student’s school experience, his reactions to school and the effect on his self-esteem. Parent also wanted Mr. Ehrenberg’s assistance in working with the school staff to ensure an IEP that would meet the student’s needs. (Parent testimony, Ehrenberg testimony)
- 32) Mr. Ehrenberg has been in private practice since 1980. A large part of his practice includes work with students who have learning disabilities. In addition to counseling clients, he consults with schools, trains teachers and staff on ways to work with learning disabled students, and on educational program planning and implementation for students with special education needs. Before opening his practice in 1980, Mr. Ehrenberg worked at Leland and

Gray Union High School as the Director of Guidance and as a Guidance counselor. In that capacity he advocated for students with special education needs. (Parent/3/Ehrenberg Resume, Ehrenberg testimony)

- 33) Mr. Ehrenberg frequently consults with IEP teams regarding the needs of his clients. He also trains teachers to work specifically with his clients. He has taught at the graduate level on the topic of designing an appropriate curriculum for learning disabled students. He has worked with learning disabled students for almost thirty years. (Ehrenberg Testimony)
- 34) When she retained Mr. Ehrenberg, the Parent expressed that she wanted the student to remain in the public school. Mr. Ehrenberg is a proponent of public schools. He does not have a bias in favor of private or independent schools. He works with public school IEP teams to help them meet the needs of his clients in public schools. (Ehrenberg testimony)
- 35) When Mr. Ehrenberg began working with the student, the student had very profound low self-esteem when it came to his view of himself as a student. The student saw school as "hopeless"; it was a place where he would never do well. Mr. Ehrenberg also recognized the signs of a significant processing deficit. (Ehrenberg testimony)
- 37) In fifth grade the student continued to express his frustration at school and told his Parent repeatedly that he would drop out of high school. Things at home became "increasingly difficult." The student refused to do homework and refused to go to school. When he went to school he would frequently come home and isolate himself in the closet. When the Parent picked the student up from school he frequently appeared in "overload." He was unable to withstand any sensory input, could not bear having the radio on in the car and needed quiet time to regroup. (Parent testimony)
- 38) The Parent requested a team meeting to discuss her concerns about the student, including his refusal to attend school refusal and his experience of overwhelm. The team met on October 24, 2007. (District/Core/125/ E-mail from Parent/127/October 24, 2007 IEP Meeting Minutes)

- 39) Mr. Ehrenberg met with the team sometime in the fall of 2007. He shared his impressions and thoughts regarding the student's disabilities and response to school. Some of the teachers attributed the student's difficulties in school to low motivation. The student's difficulties were not related to laziness or low motivation but rather due to the fact that he could not process the amount of language used in his instruction. The student "shut down" because he experienced cognitive overload due to his severe difficulties in processing. The student was experiencing significant low self esteem regarding his experience in school. Mr. Ehrenberg informed the team that the student needed small classes of like learners, students with language processing issues. There are public schools that have such programs. (Ehrenberg testimony)
- 40) The student continued in his refusal to attend school. His refusal was a way for him to "cognitively regroup" after experiencing cognitive overload. (District/Core/124/140/157 Parent e-mails, Ehrenberg testimony)
- 41) The student continued to express frustration and overload regarding his experience at school. The Parent was increasingly alarmed. (Parent's testimony, Ehrenberg testimony)
- 42) On January 8, 2008 the team met to review the assessments of the student's reading program. The team offered services at the Stern Center, which the Parent felt was too disruptive for the student because of the long commute it entailed. At this meeting the Parent requested that the description of the student's placement be changed to read "needs a placement which can address his reading, writing and math skills while still allowing [the student] to access the general curriculum. All of his content teachers need to be aware of his disabilities and be able to provide the curriculum to him in a way that works for him. At the same time, [he] needs to see academic success and he needs to feel that he fits in-these things will help to reduce the significant frustration and self esteem issues he is now dealing with. [The student's] Parents considered the Greenwood School as a possible placement for him but they are hoping that [the student's] needs can be met locally for 5th grade." (District/Core/162/January 8, 2008 IEP Meeting Minutes)

- 43) The school attendance records show the student missed 20 days and was tardy 3 days as of April 3, 2008. Two of the absences were attributed to testing commitments. Approximately 14 of the absences were due to refusal to attend school. (District/Core/84/Attendance Record/Parent testimony)
- 44) At the March 31, 2008 meeting, it was clear to Mr. Ehrenberg that keeping the student in the mainstream would not work. The classes were too big, and the quantity of language used in class was too overwhelming for the student. He informed the team, again, that the student needed to be in small classes with teachers trained to work with students with his learning profile and where the quantity of language used would not overwhelm him. (District/Core/192/IEP Meeting Minutes, Ehrenberg testimony)
- 45) At the March 31, 2008 meeting, the Parent told the team that the student needed to be at The Greenwood School. On April 1, 2008 the Parent informed the school that she did not agree with the IEP and the placement at the Woodstock Elementary School and requested funding for placement at The Greenwood School. (District/Core/192, March 31, 2008 IEP Meeting Minutes193) The Parent unilaterally placed the student at The Greenwood School on April 16, 2008.
- 46) The Greenwood School is a private boarding school accredited by the New England Association of Schools and Colleges and approved by the Vermont State Board of Education to serve male students ages 9-14 within the disability categories of specific learning disabilities and other health impairment. (Parent/31/Certificate of Accreditation)
- 47) Mr. Ehrenberg met with the teachers at the Greenwood School to instruct them in the student's learning profile and what methods would allow him to access his education. He observed the student at the Greenwood School on a weekly basis. The student thrived at the Greenwood School during his six weeks there. He was engaged and integrated into the life of the school. Mr. Ehrenberg described the student as "a different kid." The student had a smooth transition to Greenwood and while there showed excellent effort and work output. He had a perfect homework record. In eighteen pages of teacher reports there were virtually no

negative comments. The student was not tardy to class and never missed a day of school. (Ehrenberg testimony, District/Core/Evals/206,207/Dr. Osborne Report)

48) The student did experience an episode of “shutting down” in writing class. The teacher removed the task for the day and successfully re-engaged the student the next day to finish the assignment. (Id at 207)

49) The student presented as an enthusiastic, engaged and upbeat student during this time at Greenwood. This supports Mr. Ehrenberg’s opinion that the student’s episodes of shutting down and/or missing school are related to cognitive/academic factors and not a negative attitude toward school in general. While at Greenwood School during the remainder of his fifth grade year, the student was motivated and had a positive attitude. (Id at 208, Ehrenberg testimony)

50) On June 5, 2008 the team met to develop the student’s IEP. The District requested that the student undergo an evaluation to determine the existence of an emotional disability. Neither the Parent nor Mr. Ehrenberg thought this necessary as earlier evaluations had ruled this out. Mr. Ehrenberg remained convinced that the student’s reaction to school was a result of cognitive overload and not an emotional disorder. The Parent gave her consent to the evaluation but noted that she did not think it necessary. Mr. Ehrenberg did not object to an additional evaluation. (District/Core/229-238, Evaluation Plan and Report, Consent Form/Ehrenberg testimony, Parent testimony)

51) At the June 5, 2008 meeting, Mr. Ehrenberg explained to the team that in a mainstream classroom environment the student has significant problems processing language. He is “left behind after 2-3 sentences, still processing. The teachers move on and he is still processing; he covers it up and rallies all he can, but essentially he is coping with a way of processing information that is not being met in his learning environment...spending 2-3 times the normal effort...The kid has a unique way of learning and processing, that’s the problem of a mismatch of the environment and the learning style of the child.” The evidence supports this description. (District/Core/227-228, June 5, 2008 IEP Meeting Minutes)

- 52) The District engaged Robin Osborne to conduct the evaluation. The District has used Dr. Osborne as an evaluator on many occasions because she is competent, able to assimilate all information in one report and provide a valuable assessment. In addition to determining the existence of an emotional disability, the evaluation was specifically designed to “obtain additional information for program planning.” (District/Core/230/Notice of Evaluation, DeBalsi testimony)
- 53) In June 2008, Dr. Osborne conducted a thorough evaluation and found no evidence of an emotional or behavioral disorder that would impact the student’s ability to learn in a general sense. The student’s need to avoid school and/or shut down while in school relates to the nature of the cognitive demands that were placed on him in that environment. He does not have a negative attitude toward learning in general. Dr. Osborne’s findings support Mr. Ehrenberg’s thesis about the cause of the student’s difficulties in school. (District/Core/Evals/212/Dr. Osborne Evaluation Report)
- 54) The reasons for the student’s success at The Greenwood School include the fact that it is an environment where “every class was taught in a manner geared toward learning disabilities, not just the tutorial. Every student has a disability and every teacher is trained to teach LD students...It is likely that he benefited from the fact that he was not different at Greenwood. This would positively impact his self esteem because [he] no longer feels stupid compared to his peers at school.” He benefits being at a school where the structure, format and pace of all academic instruction enable him to experience success on a regular basis. All of these factors are part of an appropriate educational environment for the student. (District/Core/Evals/212, 215/Dr. Osborne Evaluation Report)
- 55) The support the student needs is specific to the structure, pace and content of his academic program. He will shut down when he feels overwhelmed cognitively. (District/Core/Evals/213/Dr. Osborne Report, Ehrenberg testimony, Dr. Rosow testimony)

- 56) Dr. Osborne's evaluation confirms Mr. Ehrenberg's opinion of the student's language processing disorder and the student's response to cognitive overload.
(District/Core/Evals/214/Osborne Report, Ehrenberg testimony, DeBalsi testimony)
- 57) In July 2008, the parties engaged in mediation and reached an agreement dated July 9, 2008 (The Agreement). The Agreement resolved the dispute regarding the student's placement for the 2008-2009 school year and provided an agreed upon structure with respect to future educational issues regarding the student. The intent of the Agreement, as articulated therein, also was to provide predictability and an agreed upon process for resolving future disputes regarding educational decisions. (District/5/Other/01/Mediated Agreement)
- 58) Under the Agreement, the District was responsible for paying a specific sum to The Greenwood School for tuition expenses for the 2008-2009 school year. The District also paid an amount for counseling services and an amount to the Parent for travel costs associated with picking up and returning the student to The Greenwood School. (Id.)
- 59) The Agreement provided that the planning for the student's transition to seventh grade would proceed through the IEP process with a final IEP team decision no later than May 15, 2009. If the team could not reach consensus by then, the District would propose an IEP and placement no later than June 1, 2009. The Parent could pursue her due process rights if she disagreed with the IEP and placement offered by the District. In the event the Parent filed for due process, the Agreement provided that the Woodstock Elementary School would be considered the last agreed upon placement for purposes of "stay put." (Id.)
- 60) The mediated Agreement does not contain a presumption regarding the student's placement for seventh grade. The Parent signed the agreement on July 11, 2008. Mr. DeBalsi, Director of Instructional Services for the District, signed the Agreement on July 30, 2008.

Sixth Grade 2008-2009

- 61) The student attended The Greenwood School for his sixth grade year. The student fits squarely in the two categories of students at The Greenwood School: those with Specific Learning Disabilities (reading, decoding, comprehension, handwriting and math) and those with Other Health Impairment (attentional issues and executive functioning difficulties). (Rosow testimony)
- 62) The student manifests his disabilities in a very complicated and unique manner. He is a smart and complex student who can reason at a high level and learn complex information, but his working memory and processing speed make it difficult to deliver instruction. It is difficult to determine when the student may experience cognitive overload. The student presents emotional and behavioral responses to his learning disabilities that complicate his profile. In addition to his learning disabilities, the student struggles with significant self-esteem issues and needs to be in a peer group where he does not appear different. (Testimony of Rosow, Ehrenberg)
- 63) At the Greenwood School the student received a tutorial with one other student, small group instruction in math (4 students), and small class instruction in social studies and science (5-8 students). He also took part in social pragmatics including application of math in woodshop, music, physical education and art classes. These classes had 6-12 students in them. (Rosow testimony)
- 64) The Greenwood School is a boarding school where many of the academic teachers serve in the residential life community. The whole day is structured around language development. All of the teachers are trained to work with students with learning disabilities. (Rosow testimony)
- 65) At the end of the fall semester, the student had made "good gains in all areas of the language tutorial, including decoding, spelling and reading comprehension."
(District/Core/277/Greenwood School Fall Report)

- 66) The school administered the Iowa Test of Basic Skills (ITBS), a standardized achievement test, at the end of the sixth grade year. The Greenwood School also gives the students individually administered language assessments. (Rosow testimony)
- 67) Comparing the student's Spring 2009 test results to the Spring 2008 test results shows a slight percentile increase in the total reading score, decreases in social studies and science, slight decrease in language and math. In the Test Of Word Reading Ability (TOWRE) and Woodcock Test one of the student's sub-scores stayed the same, one slightly increased and three decreased from the test results of Spring 08. (District/Core/360/Greenwood Testing Record)
- 68) The Spring 2009 results of the Gallistel-Ellis Test of coding skills and word list reading show the student made gains and increased his scores from those in spring of 2008. (District/Core/333/Greenwood Spring 2009 Tutorial Report)
- 69) There are many factors that affect how well a student will perform on a standardized test, including wandering attention and anxiety. The student has had difficulty taking standardized tests in the past. (District/Core/Evals/205/Dr. Osborne report) The results of the testing, however, show the student has made a year's progress. (Dr. Rosow testimony)
- 70) The student made significant gains in reading comprehension during the 2008-2009 year. He moved from a 5.1 grade equivalent to a 6.7 grade equivalent. He went from the 38th percentile to the 49th percentile. His total reading score went from a 5.2 grade equivalent to a 6.1 grade equivalent. (District/Core/360/Greenwood Testing Record)
- 71) During the sixth grade year at Greenwood, the student had times when he "shut down" and became overwhelmed. The teachers are specifically trained to handle this situation and they knew how to respond. The instruction is individualized which allows for flexibility when needed. He also experienced bouts of homesickness that occasionally interfered with his ability to focus on his work. The Greenwood School staff is trained to respond to these

issues. His overall experience at Greenwood has been a successful one despite the times of homesickness. (District/Core/335/ Greenwood Report/Rosow testimony)

72) The student received high marks for effort at Greenwood and had a very successful year.

While at Greenwood the student made gains in reading rate, fluency, accuracy and comprehension. While he still struggled with writing he has made gains in that area as well. When he entered Greenwood he had difficulty writing sentences and by the end of the year, with the support of structures, he was writing paragraphs. At Greenwood, the student was engaged, showed up on time, enjoyed class, liked a challenge, and considered himself as capable. He had a positive and enthusiastic approach to learning. He fit right in. His self-esteem increased. He experienced success. (Testimony of Rosow and Ehrenberg)

73) The team met on February 3, 2009 for a progress review. The Greenwood teachers reported significant improvement in writing, and improvement in handwriting, math and spelling.

(District/Core/364b03/February 3, 2009 IEP Meeting Minutes)

74) The parties tried to schedule the April IEP meeting but were unable to find a day that worked for all participants. Scheduling was complicated by the fact that the spring is a very busy time for teachers and school staff. (District/Core/367-373, E-mail correspondence)

75) Ms. Winslow, Ms. Newberry and Ms. Scott visited The Greenwood School in April and observed the student. None of these witnesses has ever worked with the student. On May 1, 2009 Ms. Winslow and Ms. Scott began work on the IEP. (District/Core/391/Winslow e-mail, Testimony of Winslow, Newbery and Scott)

76) Ms. Winslow and Ms. Scott have worked with students who have significant learning disabilities. This student presents not only significant learning disabilities but also unique response to his difficulties and accompanying self-esteem issues.

77) The team met on May 12, 2009 at The Greenwood School. Dr. Rosow presented a comprehensive review of the student, his records, his progress and challenges at Greenwood

and his present level of performance. He spoke about the student's needs and what is necessary for the student to be able to access his education. Dr. Rosow stressed the importance of avoiding overload and the importance of pacing. He presented a set of recommendations and modifications. (District/Core/410a01/List of Modifications)

78) Ms. Winslow presented a draft IEP at the meeting. This IEP called for placement at the Woodstock middle school. Dr. Rosow asked that he review the proposed goals and objectives with the student's teachers at Greenwood before offering feedback to the team. (District/Core/400-401/IEP Minutes)

79) Mr. Peterson told the team that the purpose of the meeting was to present the IEP and talk about transition to the middle school. There was no discussion about placement. (District/Core/402/IEP Meeting Minutes)

80) Mrs. Winslow described the student's schedule at the middle school as contemplated under the IEP. It included: four 80-minute blocks, a reading block and lunch. The student's day would include work one to one with Ms. Scott and/or Ms. Winslow and mainstream classes. (District/Core/401/IEP Minutes) The mainstream classes at the middle school include fifteen to twenty students. (Id.)

81) The Parent provided a seven-page document as her written input regarding the IEP. It included language related to placement. She wanted the IEP to reflect that the student needed "small classes so that he is not overwhelmed. When overwhelmed his self esteem suffers and he shuts down so that he is not available for learning. The classes and curriculum need to be adjusted in real time to [the student's] processing abilities...He needs to be with other students like himself so he doesn't feel different. A small language based and highly adaptable program with staff trained in the above issues has been shown to be effective for him. These elements do not allow for full participation in a regular education class environment." (District/Core/405-410a02/Parental Input)

- 82) The Parent's request specifically asked for small classes, similar peers, residential setting with evening study support, with all classes having adjustable pace in real time to match the student's difficulties. In short, the Parent's input described a program and environment like that at The Greenwood School. (Id)
- 83) At the May 12 meeting, Dr. Rosow told the team that the student would not be able to succeed in a class of 18 students. Dr. Rosow acknowledged that the middle school sounded like a wonderful school but not for this student. Dr. Rosow acknowledged that the District had a lot to offer but it would not work for this student. He explained that the student could not succeed in a large group of students; he would go into sensory overload. Dr. Rosow explained that the student presents in a very unique fashion and it is tricky to observe his difficulties in a class of four students let alone a class of 20. The program presented by the District in the draft IEP would cause overload and shut down by the student. In the best of all worlds the student would be educated in a setting such as Greenwood while living at home attending school in Woodstock. (District/Core/402/Minutes, Rosow testimony)
- 84) At this point in his development, the student has limited self-awareness. He can be unaware that he is feeling overwhelmed and/or has difficulty putting his feelings into words, and he has difficulty untangling the frustration he has regarding his learning challenges from the things that represent these challenges in his mind. This makes it difficult, if not impossible, for the student to be aware let alone articulate when he begins to experience cognitive overload. (District/Core/447/Greenwood Report, Ehrenberg testimony)
- 85) When the student attended public school he chose to stay in the mainstream classes for as long as possible so that he did not appear different from the other students. This resulted in cognitive saturation, which then resulted in overload, shut down and frustration. (Parent/27/Osborne report)
- 86) The student clearly struggles under the weight of language processing and becomes completely drained by the cognitive effort he puts forth in class. (Parent/26/Osborne report)

- 87) On May 14, 2009 the Parent sent an e-mail asking to observe content classes such as science, global studies and math being taught by teachers the student would have if he attended the middle school. (District/Core/411/Parent e-mail)
- 88) After the May 12 meeting, Mrs. Winslow and Ms. Newberry re-worked the IEP. They asked for the input from Greenwood teachers regarding the goals and accommodations. (District/Core/418a01/Newberry e-mail) They incorporated into the IEP some of the information provided by the participants at the meeting. They reviewed the Parent's written input and incorporated aspects they thought appropriate. They did not make any changes regarding placement. (Testimony of Winslow and Newberry)
- 89) On May 13, 2009, Ms. Winslow met with Mr. Peterson, Ms. Newberry and Ms. Scott to review the notes from the meeting and to make revisions to the IEP. They included a provision for Mr. Ehrenberg to conduct formal training of the staff. (Winslow testimony)
- 90) On May 21, 2009 Mr. Peterson spoke with Dr. Osborne by telephone. Ms. Newberry was present during the conversation. Mr. Peterson asked her if the student had a "shot at being successful" at the middle school. According to the notes of the conversations she responded that the curriculum and expectations must not exacerbate the student's feelings of being stupid or different. (District/Core/Peterson/05/Notes)
- 91) On May 26, 2009 Ms. Winslow faxed the student's IEP with changes to the Parent and to her advocate. The revised IEP incorporated some of the Parent's requested changes or additions except it provided for placement at the Woodstock middle school and provided the student would be enrolled in mainstream classes in addition to his one to one instruction.
- 92) The agenda for the May 27, 2009 meeting shows an anticipated one-hour meeting with the purpose to plan for transition. The topics were: Review of draft IEP (present levels, goals and objectives, accommodations) (15 minutes), Services (20 minutes), Class Schedule (15 minutes) and Other (10 minutes) (District/Core/456/Agenda). Nothing on the agenda referenced a discussion of placement.

- 93) The Parent was dissatisfied that the revised IEP contained “disjointed inserts” from her written input she had delivered to the team that the pieces were not included in a meaningful way, and that much was not included at all. She wanted more of Dr. Osborne’s report included in the IEP. (District/Core/459/Minutes of meeting)
- 94) The meeting lasted close to three hours. Mr. Peterson cancelled another appointment in order to remain with the team and work on the IEP. (Peterson testimony)
- 95) Mr. Ehrenberg made clear his concerns about the student experiencing language overload related to his deficiencies in processing abilities. This is a “profound problem” that would not be avoided in the current IEP. The delivery and pace of the instruction is of utmost importance in all subject matters. Mr. Ehrenberg was asked to do consultation or transition work with the staff at the middle school. (District/Core/461/Minutes of IEP Meeting)
- 96) The focus of the discussion at the May 27th meeting regarded the student at Woodstock Middle School. There was no discussion of any other placement. (Ehrenberg testimony)
- 97) There was no discussion about the findings in Dr. Osborne’s report. There was no discussion about small classes, like learners, self-esteem, or difficulties with feeling different from peers. (Parent testimony) At the May 27 meeting, Ms. Newberry clarified the student’s schedule at the middle school. (District/Core/461/Minutes of IEP Meeting/ 487/Student’s proposed schedule)
- 98) Ms. Newberry noted that the team had thus completed the document. Mr. DeBalsi said it would be presented formally to the Parent. Mr. Peterson said that in terms of closure, he believed it was a bonafide document. The Parent’s advocate stated that the Parent did not agree with the fact that the IEP had the student in regular classes 40-79% of the time. (District/Core/462/Minutes) Mr. DeBalsi stated that the Parent could request another meeting or initiate her rights under due process or mediation. (District/Core/463/Minutes)

99) On May 29, 2009 the District formally presented the IEP to the Parent. The District presented a Notice of Local Education Agency Decision explaining that the District proposed placement at the middle school for the 2009-2010 school year. (District/Core/465/Letter to Parent)

100) The IEP provides for the following special education services:

- consultation four times a year for the teachers and staff,
- 40 minutes five times per week of one to one instruction with the special education teacher for content support in global studies and science,
- 45 minutes five times per week of one to one direct instruction in reading,
- 42 minutes 2.5 times per week of one to one instruction for structured reading,
- 42 minutes 2.5 times per week of one to one instruction with the special education teacher for structured writing. (District/Core/482/IEP)

101) The page that addresses placement, accommodations and modifications for assessments provides: [the student] is in need of specialized instruction in reading and writing, along with pre-teaching of vocabulary and key concepts. Additionally [he] requires time and guidance for access to technology. Instruction and pacing must be modulated to match [his] ability to process information without becoming flooded with information. All language demands must be modulated based on [his] ability to process language at that moment.
(District/Core/483/IEP)

102) The general characteristic of his placement is:

- “inside regular class 40% to 79% of the time.” (District/Core/484/IEP)

103) Under the IEP the student would receive instruction in one to one sessions. He would also be in mainstream classes in Global Studies and Science, and Math every other day for 80-minute periods. He would elect classes in Physical Education, Family and Consumer Science or Technology Education or Health. These classes are also 80 minutes in length. There are no small group classes. (District/Core/486-487 IEP)

- 104) On June 1, 2009 the Parent and Mr. Ehrenberg visited the middle school and observed classes with an eye toward trying to determine whether the classroom environment would be a good match for the student. The District staff set up the observation. (Ehrenberg testimony)
- 105) Mr. Ehrenberg went into the observation with an open mind. Indeed, he is a proponent of public education. He believes the richness of the environment benefits students. He also recognizes it is not appropriate for every student. (Ehrenberg testimony)
- 106) Mr. Ehrenberg has seen the type of program the student needs in public schools. He did not see it at Woodstock Union Middle School. (Ehrenberg testimony)
- 107) Mr. Ehrenberg spoke with the teachers of the classes he observed. He also observed the make-up of the students in the class. He was able to ascertain that some of the students had received pre-teaching of concepts and other preparation before class. (Ehrenberg testimony)
- 108) Mr. Ehrenberg was attentive to how much of the instruction was given in complex language and how much processing would have to happen in real time for the student to follow what was going on in order to benefit from the lesson. He also kept track of the volume of language produced by the teacher. As an example, the Global Studies teacher spoke for eighteen minutes without stop while she conveyed complex instructions, concepts and descriptions of her expectations. At other points in the class, the teacher presented material verbally for 8 to 16 minutes at a time. Most of the information being presented was “language and concept rich, reminding students of grammatical and structural rules as well as the many task specific details they had to keep track of.” (Parent/13/Ehrenberg report)
- 109) The science class had similar language-rich and conceptually complex instruction presented in an entirely verbal format. (Id.)
- 110) Even with competent teachers and pre taught concepts, the student would be quickly overwhelmed by the quantity of language processing and the demands of the instruction in the mainstream classes. (Parent/14/Ehrenberg Report, Ehrenberg testimony)

- 111) Mr. Ehrenberg has worked in depth with the student regarding his functioning in the world and in school. He has consulted with the District and school personnel during the years he has worked with the student. He has extensive experience working with students with learning disabilities. He knows the student better than any other professional who testified at the hearing. His description of the student and his disabilities is supported by several evaluations in the student's file. He describes the student as on the severe end of the spectrum with his processing disabilities. The classes he observed in the middle school would not be appropriate for the student. (Parent/9, Ehrenberg report, Ehrenberg testimony)
- 112) It is difficult, even for trained teachers, to identify when the student is becoming cognitively overloaded. It is doubtful that teachers, in mainstream classes, could adequately monitor the student to anticipate overload or be able to match the level of class demand to his ability to deal with language. (District/Core/486/IEP, Rosow testimony, Ehrenberg testimony)
- 113) The student is unable to identify when he is approaching cognitive overload. (Ehrenberg testimony)
- 114) The student's need to fit in with his peers makes it likely that he would want to stay in the mainstream classes until he was completely overwhelmed. It is likely his self-esteem would plummet if he were placed in a situation where his needs were not met.
- 115) The student needs a placement that provides small classes taught by teachers trained to work with students who have learning disabilities and where the structure, format and pace of the academic instruction enable him to access the curriculum and give him a chance to experience success. (District/Core/Evals/212-215/Dr. Osborne evaluation)

Issues Presented and Burden of Proof

The Parent claims eleven procedural violations on the part of the District and six substantive violations. All of the violations, the Parent alleges, have deprived the student of FAPE and/or deprived the Parent of a meaningful opportunity to participate in the IEP process as required under the Individuals with Disabilities in Education Act (IDEA) and/or Section 504 of the Rehabilitative Act. The Parent requests an order requiring the District to “make whatever financial arrangements are necessary to allow the student to attend The Greenwood School.”

The burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief, here the Parent. *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). Because I find for the Parent on the substantive violation and conclude the IEP fails to offer FAPE in the least restrictive environment, I do not address the procedural issues.

Theories of Law Governing the Proceeding

Pursuant to Vermont special education law, the Individuals with Disabilities in Education Act (IDEA) and, effective July 1, 2005, the Individuals with Disabilities in Education Improvement Act (IDEIA), children with disabilities have a right to receive a free, appropriate public education (FAPE) that emphasizes special education and related services designed to meet the unique needs of the child with a disability. 20 U.S.C. §1400(d). FAPE consists of special education and related services that are available to the student at no charge and that meet the state’s educational standards, include an appropriate education and conform to the child’s IEP. “Special Education” is defined as specially designed instruction to meet the unique needs of the student. 20 U.S.C. §1402 (29).

In order to comply with the IDEA, the District must develop and offer an IEP that is reasonably calculated to enable the child to receive meaningful educational benefit. *Bd. of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982) (hereafter *Rowley*). Failure to do so, results in a denial of FAPE.

Substantive Violation – Failure to provide FAPE in the LRE

Issue

Whether the May 29, 2009 IEP fails to provide FAPE in that it does not provide an appropriate educational program, which includes an appropriate placement in the least restrictive environment (LRE).¹

Positions of the Parties

Parent's Position

The Parent argues that the IEP fails to meet the student's educational needs as documented in Dr. Osborne's evaluation, and confirmed by Mr. Ehrenberg, Dr. Rosow and the student's academic history and experiences. The Parent also states that placement at Woodstock Middle School is not an appropriate placement. The Parent argues the potentially harmful effects of returning the student to the Woodstock school include his experiencing cognitive overload, an inability to participate in the mainstream classes, a return of the growing sense of inadequacy, low self-esteem and despair about his ability to perform academically.

District's Position

The District contends that the student's needs can be met at the Woodstock school and as such it is the LRE for the student. The District states that the IEP addresses the student's needs by offering special education services and accommodations while allowing the student to participate in the general education curriculum to the greatest extent possible. According to the District, it can provide FAPE in the middle school, which is the least restrictive environment and, therefore, the placement required by law. In addition, in its post hearing brief the District submits that the Parent has not met her burden on this issue because she offered no expert testimony on the issue and that Mr. Ehrenberg's testimony and report regarding his observations of the Woodstock

¹ This issue encompasses the specifics of the Parent's claims set forth in § 2 (a) through (d) in the Pre-Hearing Order

school should not be considered.²

Discussion

LRE and FAPE

The IDEA is predicated upon giving students with disabilities a free and appropriate education designed to meet their individual needs. 20 U.S.C. § 1401; *Schaeffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). FAPE requires a written IEP that is specifically designed for the student. The IEP should reflect the results of evaluations identifying the student's needs and skills and it must identify the use of appropriate special educational services including any related services. The IEP must be reasonably calculated to enable the student to receive a meaningful educational benefit. *Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176 (1982). It must provide an appropriate program and an appropriate placement for the student in the least restrictive environment. The IEP must be judged as to its appropriateness at the time it is written, and not with respect to subsequently obtained information about the student. The IEP must take into account what was objectively reasonable at the time it was drafted. *Roland M. v. Concord Sch. Committee*, 910 F.2d 983 (1st Cir. 1990), *cert. denied*, 111 S. Ct 1122 (1991). In developing the IEP for a student with disabilities, the IEP team must consider: the strengths of the child, the concerns of the parents for enhancing the education of their child, the results of the initial evaluation or the most recent evaluation of the child and the academic, and functional needs of the child. 20 U.S.C. § 1414 (d)(3)(A).

Under the IDEA, FAPE, placement and LRE are inextricably linked by the concept of appropriateness. In order to provide FAPE, the student's program must be appropriate and the placement must be appropriate in the LRE. A determination of the LRE requires a finding that the environment is appropriate for this individual student. There is a presumption that the student's local public school is the LRE. That presumption operates, however, as the starting point of the inquiry and not the end point. If the evidence establishes that placement at the local

² Because the District raises these objections for the first time in its post hearing brief I will not consider them here. The District did not object to the introduction of Mr. Ehrenberg's opinion testimony or the introduction of his report at the hearing. It is too late to raise the objections now.

is not appropriate, the presumption disappears. For, indeed, the most important factor is that students with disabilities receive an appropriate education even if it is not in the mainstream environment.

Appropriate Placement

One of major purposes of enacting the IDEA was to ensure that students with disabilities were not segregated automatically from their typically developing peers and warehoused in institutional facilities. Under 34 C.F.R. 300.114(a)(2) each public agency must ensure that –

- (i) To the maximum extent *appropriate*, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are non-disabled; and
- (ii) Special classes, separate schooling, or other removal of children with disabilities from the regular education environment occurs only if the nature or severity of the disability is such that education in the regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (Emphasis added)

The presumption of least restrictive environment under the IDEA means that if a public school placement is appropriate, a school District need not consider a private placement, even one preferred by the parents. *Schoenbach v. District of Columbia*, 309 F. Supp. 2d 71, 80 (D.D.C. 2004); *Jenkins v. Squillacote*, 935 F.2d 303, 305 (D.C. Cir. 1991). The IDEA's mainstreaming provision establishes a presumption, not an inflexible federal mandate. Under its terms, children with disabilities are to be educated with children who do not have disabilities only "to the maximum extent appropriate." 20 U.S.C. §1412(5)(B). Mainstreaming is not required and would not be appropriate where the student would not receive an educational benefit from mainstreaming into a regular class or any marginal benefit from mainstreaming would be significantly outweighed by benefits that could feasibly be obtained only in a separate instructional setting. While there is value in having students with disabilities interact with their typically developing peers, the fact that the mainstreaming provision only creates a presumption reflects a congressional judgment that receipt of such social benefits is ultimately a goal that is subordinate to the requirement that students with disabilities receive meaningful educational benefit.

The starting point, therefore, is to examine the May 29, 2009 IEP to determine if the placement is appropriate for this individual student and whether it will meet his individual needs. The IEP in question addresses placement first by describing the reasons why the student cannot participate full time with non-disabled children. In this case, the IEP reads that the student cannot because he “is in need of specialized instruction in reading and writing, along with pre-teaching of vocabulary and key concepts. Additionally [he] requires time and guidance for access to technology.” This explains the one to one special education services. The IEP goes on to identify the general characteristic of the student’s placement. Here the IEP provides that the student will be “inside regular class 40% to 79% of the time.” This explains his participation in mainstream classes. Succinctly put, the student’s placement consists of one to one instruction and mainstream classes. The question is whether this placement is appropriate for this student. The evidence shows it is not. The student cannot adequately receive instruction in mainstream classes and he will be isolated from his peers during the one to one services. The student’s history, the evaluations and reports and testimony from professionals who have worked with the student clearly establish that this placement is not appropriate for the student.

This student has complex and severe learning disabilities that present in a complicated and unique manner. While he can reason at a high level, his working memory and significant deficiencies in processing make it difficult for him to receive instruction. He has a Specific Learning Disability in written expression, reading fluency and math calculation. He also has an Other Health Impairment, diagnosed as Attention Deficit Disorder (ADD). He is deficient in his abilities to process information. His processing deficiencies cause him to experience cognitive overload when in a language rich environment. In a mainstream classroom, the student cannot function due to the pace of instruction and the language demands. When cognitively overloaded he shuts down. Shutting down is a response to the cognitive overload and allows him to regain equilibrium. When he experiences overload and/or shuts down, he is unable to attend to school. He also has a history of suffering from significant low self-esteem as it relates to his ability as a student. This is caused by and exacerbated by his strong desire to fit in with his peers and not call any attention to himself in a way that makes him appear different. The low self-esteem has a negative impact on his education. These factors explain why this student’s learning disabilities present as complex as well as severe.

The evidence in this case, shows that this complicated profile was operating even in the student's third grade. It was then that the demands of school significantly impeded the student's educational experience. It was then that he started to refuse to go to school. Dr. Cable's evaluation documented the student's processing deficiency and the resulting response of shutting down. As a result of this processing deficiency, the student's mental energies quickly drain, making class an exhausting experience for him. Dr. Cable also found that the student had fewer emotional responses available to him as compared to his peers. When experiencing overload, the student attempted to maintain his equilibrium by shutting out situations and thoughts that disturbed him. This was how he responded to academic tasks he could not complete. Shutting down allowed him to regain emotional control when he felt helpless or overwhelmed to meet the demands of school. In third grade, the student's self esteem suffered. He began to refer to himself as "stupid." He noticed that the other students could do the work that he could not. These problems, first documented in third grade, continued and/or magnified until the student left the Woodstock School toward the end of fifth grade.

The minutes of IEP meetings in fourth grade document the student's continued difficulties functioning in school as evidenced by his shut down response to school related tasks. The student began to work with Mr. Ehrenberg, a therapist who specializes in working with learning disabled students. Mr. Ehrenberg recognized the student's processing deficits and his troubling and profoundly low self-esteem.

In addition to the specific learning disabilities, processing deficiency, ADD, sensory overload and shut down response, the student's capacity to function at school was compromised by his inability to recognize when cognitive demands began to overload him. He simply does not have that level of self-awareness and capacity to recognize, let alone articulate, his experience in class. The self-esteem issues and the student's strong desire to "fit in" with his peers also exacerbated the situation. It meant that he would not act in any way that made him appear different. Even if he had been able to recognize signs of cognitive overload, therefore, he would have remained in the mainstream classes in order to avoid appearing different from his peers. The teachers at Woodstock, in fact, noted this dynamic. They told Dr. Osborne that the student

would choose to remain in mainstream classes despite the fact that he could not process the information and was overwhelmed by the language demands; he just did not want to appear different from his peers.

By fifth grade, the student started to isolate himself in a closet after coming home from school. He could not handle any more stimulation. Going in the closet was his attempt to find the necessary quiet to allow him to cognitively regroup. This was a response to his inability to handle the demands of school. Mr. Ehrenberg told the IEP team during the fall of the student's fifth grade year, that the student's school refusal and academic challenges were not caused by low motivation (as some teachers suspected) but rather by the fact that he was unable to process the amount of language used in the instruction. The student's low self-esteem and desire to fit in, compounded the situation. In order to access his education, the student needs small classes geared to students with language processing issues. This would address two of the student's impediments to functioning in school: the language processing deficiency and the self esteem issues related to his need to fit in with his peers and not appear "different." By the spring of fifth grade, it was clear that the student could not remain in the mainstream classes. The classes were too big and the quantity of language too much for the student to process. Even with supplementary aids and services, the educational program and placement at the Woodstock school was not appropriate. Recognizing this, the Parent enrolled the student in The Greenwood School for the remaining six weeks of fifth grade.

Only two witnesses at the hearing had worked with the student, Dr. Rosow and Mr. Ehrenberg. At the May 12, 2009 IEP meeting, Dr. Rosow explained to the team members that placement in a mainstream class is not appropriate. The student would be lost in a mainstream class of 15-20 students due to his cognitive processing issues and the amount of sensory input. At the May 27th meeting, Mr. Ehrenberg also informed the team that the student would suffer in a mainstream class. Mr. Ehrenberg testified unequivocally that the student would not receive educational benefit in a mainstream class in light of his severe deficits in language processing, his tendency to react by shutting down, and his experience of becoming overloaded. Dr. Osborne's evaluation supports Mr. Ehrenberg's description of the student's response.

Mr. Ehrenberg observed the regular education classes at the Woodstock Middle School. These were classes similar to those the student would attend. His testimony relating to his observations and his report contain information about the student that had been relayed to the IEP team on several occasions. All of Mr. Ehrenberg's testimony about the student and Mr. Ehrenberg's conclusions about his abilities to succeed in the mainstream classes were available at the time the IEP was completed. Mr. Ehrenberg was clear that the student would become overwhelmed quite early in such a class by the quantity of language processing demanded by the instruction. In his report, Mr. Ehrenberg states:

In many ways these classrooms provide excellent examples of the benefits and limitations of mainstreaming. The amount of modification that would have been required in either classroom in order to make them assessable to [the student] would essentially involve writing an entire second curriculum, and developing it in virtually a one to one format, using non language based presentation for most of the content....Even if [the student] were getting coached and prepped both before and after class, the sheer volume of language...would have completely overwhelmed him. (Parent/14/Ehrenberg report)³

This case contains many similar facts and legal issues as those in *Briere v. Fair Haven School District*, 948 F. Supp. 1242, 1254 (D.Vt. 1996). In *Briere*, the court found the District committed a substantive violation of the IDEA when it offered an IEP that was not reasonably calculated to enable the student to receive an educational benefit. In *Briere* the student had a number of serious learning disabilities including a language disorder that affected her expressive and receptive language functioning. The student had attended public school through elementary school. As high school approached, the mother expressed to school administrators her concerns about the student's ability to thrive in the mainstream classes at the public high school. The mother felt that the complexity of the language and the pace of instruction would overwhelm the student. After visiting the public school and a private school designed to educate students with similar disabilities, the mother asked for placement at the private school. At the next IEP meeting, the District presented an IEP that provided for placement at the public school, with the student attending several mainstream classes. The mother attempted to discuss placement at the private school but the other members of the team refused to discuss the alternative residential placement. The mother placed the student in the

³ Mr. Ehrenberg characterized the student's earlier public school experience as one where he was "sacrificed at the alter of mainstream."

private school and petitioned for due process. The hearing officer ruled for the District and the mother appealed.⁴

The court in *Briere* held for the Parent finding that placement at the public school was inappropriate because the mainstream classes where the student would be placed used concepts and language, which were too complex for the student. In addition, the pace of instruction was much too fast. The court noted the conclusions of the Parent's expert witness who testified that in the mainstream classes the "language and subject matter were too complex, that the pace of instruction was too rapid and the courses failed to use multi-sensory approaches to learning...[D]ue to [the student's] severe language disorder and the increasing disparity in her educational attainment compared with her classmates, she would be 'lost' in mainstream classes." *Id* at 1256. Based on those facts, the court found the public school placement was inappropriate and the IEP failed to provide FAPE.

Here the student also has a language disorder that significantly affects his ability to process language. As in *Briere*, the concern here is the student's ability to process language in a mainstream class where the complexity of language and the pace of instruction would overwhelm the student. The Parent here expressed her concerns about placing the student in the public school. As in *Briere*, the District here presented an IEP that placed the student in the public school, in mainstream classes, despite the Parent's (and professionals who worked with the student) expressed concerns. The concern here, as in *Briere*, was that the student would be lost in mainstream classes. Given very similar facts, the court in *Briere* found the public school placement was inappropriate and the IEP failed to provide FAPE.

The Parent has successfully rebutted the presumption that the Woodstock Middle School is the appropriate least restrictive environment. The District has not effectively responded. The District's witnesses testified in a conclusory manner that the IEP provided FAPE in the LRE. They never addressed specifically, however, any the concerns raised by Mr. Ehrenberg, Dr. Rosow or Dr. Osborne. No witness for the District contradicted Dr. Rosow's testimony or any

⁴ The hearing officer rejected the request because the school was an approved special education facility.

of the information he offered to the team relating to appropriate placement. No one testified as to how the student would receive meaningful educational benefit in a mainstream class given the severe language processing deficits and shut down reactions. And yet placement under the IEP calls for general education classes 40% to 79% of the time. No one rebutted Mr. Ehrenberg's conclusion that the student would be cognitively overwhelmed after just a few minutes of mainstream instruction. No one testified as to how Dr. Osborne's concerns regarding the student's self esteem and fears about being different would be handled given the plan that the student take breaks or leave classes when becoming overwhelmed. No one addressed that the student has very little meta-cognitive awareness, is frequently unaware that he is feeling overwhelmed and/or has difficulty putting his feelings into words, and that he has difficulty untangling the frustration he has regarding his learning challenges from the things that represent these challenges in his mind. It is difficult even for teachers trained to work with students with learning disabilities to always recognize when the student was experiencing cognitive overload – and these teachers work with small groups of students. Yet, the IEP places the responsibility of this, at least at the beginning, on the teachers in the mainstream classes where there are 15-20 students.

The District argues that its teachers have worked successfully with students who have similar learning disabilities and could effectively work with this student. And yet the program and placement they developed do not effectively address this student's needs. Mr. Ehrenberg testified that the student's learning profile is very unique. Dr. Rosow agreed. There are complicating factors present in the student's profile. His learning disabilities and other health impairment do not exist in a vacuum. His response to school and to his disabilities is complicated and difficult to anticipate or respond to. At several points in this case, the District noted the large number of evaluations of the student. And there were many, requested by the Parent as well as the District. Each of the numerous evaluations, as conceded by the District's witnesses, provided valuable information regarding the student. This suggests that the student is unique. This suggests that the adults in the student's life were having difficulty ascertaining the exact nature of his disabilities, his responses to his educational environment and how to effectively educate him. This suggests a complicated profile.

Appropriate Program

The District agrees that the student's program must prevent him from being overwhelmed, address the risk for potential emotional harm with respect to self confidence through academic failure and address issues related to isolation and a feeling of being "different." The District asserts that the IEP and the student's program at Woodstock Middle School satisfactorily addresses these issues. According to the District, the IEP responds to the cognitive overload challenges while allowing the student to participate to the greatest extent in a mainstream environment. In short, the District asserts that the May 29, 2009 IEP and its elements are reasonably designed to provide the student with FAPE.

A review of the IEP demonstrates otherwise. According to the IEP, the student will receive instruction in one to one sessions for part of his day and he will be in general education class, 40% to 79% of the time. The evidence demonstrated that the student cannot function effectively in the mainstream classes. These classes are 80 minutes in length. They have anywhere from 15 – 20 students. These classes are not geared for students who have processing deficiencies. In fact, these classes are rich in language instruction and are taught at a pace that would overwhelm the student. Even with pre-teaching, the evidence overwhelmingly supports a finding that the student would be lost early on in these classes, that the method of instruction would cognitively overwhelm the student to the extent that it would preventing him from obtaining a meaningful educational benefit.

The IEP does not address the potential for emotional harm with respect to loss of confidence through academic failure. The fact that the IEP calls for mainstream education for a student who can not handle mainstream classes, sets up the potential for academic failure with the resulting loss of confidence and potential for emotional harm. Indeed that is what the history shows in this case. The evaluations and reports are clear. The student was unable to handle the language demands of the mainstream classes. His response was so strong that the District suspected he had an emotional disability. The student's extreme reaction to school related to the fact that he could not perform in mainstream classes, became cognitively overwhelmed and shut down. This caused extremely low self-esteem. The student worked with a therapist to address

this issue. And yet, the IEP in question sets up a similar situation as that which resulted in the student's decline.

Despite the District's assertions, the IEP does not address the real potential of the student becoming isolated and feeling different from his peers. Under the IEP, the student would receive more than two hours of one to one instruction five times a week. Certainly there is nothing more isolating than one to one instruction. When not in a one to one setting, the student will be in general education class where the teachers, at least at the beginning, are to recognize any signs of the student becoming overwhelmed. The student could then leave the classroom, walk around and take a break. Even if the teachers were able to recognize the signs of overload and allow the student to take a break, this would serve to highlight his differences from the other students. The IEP contains as goals and objectives that the student develop the capacity to recognize when he is becoming overwhelmed. He could then cue his teachers and take a break. Even if the student developed this level of self awareness, his strong desire to be like his peers would make it difficult and highly unlikely that he would remove himself from the group and call attention to his situation.

Conclusion

The Parent has effectively rebutted the presumption that placement in the Woodstock Middle School was appropriate and the least restrictive environment. The District did not effectively address the Parent's evidence. I find that placement at the Woodstock Middle School as provided in the IEP does not amount to an appropriate placement reasonably calculated to enable the student to receive a meaningful educational benefit in the least restrictive environment. The Parent has met the burden of proof on this issue. The IDEA requires that children be placed in the least restrictive alternative in an appropriate educational environment. An inappropriate, although less restrictive placement is impermissible. *Briere* citing *Kruelle v. New Castle County Sch. Dist.*, 642 F.2d.687, 695 (3rd Cir.1981).

The May 29, 2009 IEP will not provide an appropriate program for the student. According to the undisputed testimony from Thomas Ehrenberg, the evidence from Dr. Rosow, the reports and evaluations admitted in evidence, placing the student in a mainstream-learning

environment where he is inundated with language that he will not be able to process will not provide him with FAPE. I conclude that the IEP does not provide FAPE. It is not reasonably calculated to enable the student to receive a meaningful educational benefit in that it does not provide an appropriate program designed to meet the student's individual needs. *Board of Educ. of the Hendrick Hudson Central Sch, Dist. v. Rowley*, 458 U.S. 176 (1982).

The Greenwood School

Issue

Whether The Greenwood School would offer the student FAPE in an appropriate placement reasonably calculated to enable him to receive meaningful educational benefit.

Positions of the Parties

Parent's Position

The Parent argues that The Greenwood School is an appropriate placement that would provide FAPE because the student falls squarely within the population of students the school is designed to teach. In addition, the student's experience at The Greenwood School demonstrates the progress he has made while there. The school offers exactly what the student needs: small classes taught by teachers trained to work with students who have similar disabilities, classes paced appropriately for the student's needs, where the quantity of language will not overload him and with a peer group so he does not experience himself as different enough to negatively affect his self esteem.

District's Position

According to the District, placement at The Greenwood School resulted in regression and his loss of skills and the teacher reports of gain and progress were not enough to establish the same.

Discussion

The IDEA authorizes reimbursement for private schools if the school District fails to provide an appropriate IEP and the private school placement is appropriate. 20 U.S.C. § 1412(a)(10)(C)(ii). In addition to this statutory requirement, the Parent must prove that the placement for which reimbursement is sought is proper under the Act. *School Comm. of Burlington v. Department of Ed. of Mass.*, 471 U. S. 359 (1985). This does not mean that the private school must meet all state educational standards or be otherwise “approved” by the state. *Florence County School Dist. Four v. Carter*, 510 U. S. 7 (1993). It means only that the program must be reasonably calculated to provide educational benefit to the student by addressing the student’s special educational needs. The Greenwood School meets these requirements.

The Greenwood School is accredited by the New England Association of Schools and Colleges. It is approved by the Vermont State Board of Education to serve male students ages 9 to 14, within the disability categories of specific learning disabilities and other health impairment. The student fits squarely within the definition of the student population the school serves. The school is designed to meet the student’s unique educational needs.

The student experienced success as a student at The Greenwood School. He transitioned seamlessly at the end of his fifth grade year. The evidence is clear that the program met his needs. At Greenwood, all of the student’s classes were small. All of the classes were taught in a manner geared toward students with learning disabilities. All of the teachers are trained to work with learning disabled students. The instruction is individualized, which allows the teachers to modify the pace and respond to instances of cognitive overload. All of the students have disabilities. No one is “different” in that regard. The student thrived in this environment and made meaningful progress as a student at the Greenwood School.

The student’s educational progress at the school is evidenced by the comprehensive reports of the teachers. There is no question but that the student is involved in his classes and is a motivated and interested student. He no longer suffers from low self-esteem regarding his abilities as a student. No longer does he refer to himself as stupid. No longer does he discount the

prospect of higher education. In his writing, an area in which he struggles greatly, he has progressed from struggling to write a sentence to writing paragraphs, with support. His reading comprehension has increased significantly. He has benefited from the study hall format in the evening. Homework completion is not an issue.

The teachers' reports, in-class assessments, results of his classroom work, the effort reports, and homework completion, all show educational progress. According to the reports of the student's teachers and according to the observations of Mr. Ehrenberg and Dr. Rosow, the student has made impressive gains as a student since he began attending The Greenwood School.

The District asserts that the student did not demonstrate growth at The Greenwood School based on the results of the standardized test results in the Spring of 2009. Because some of the test results showed a decrease in the percentile scores, the District argues that this shows a loss of skills. The testing results also showed increases in scores as well. The student made significant gains in reading comprehension during the 2008-2009 year. He moved from a 5.1 grade equivalent to a 6.7 grade equivalent. He went from the 38th percentile to the 49th percentile. In addition, the standardized test scores show the student has made a year's progression.

One of the difficulties in using percentiles for measuring the progress of a child with a disability is that percentiles measure the student in relation to the population of non-disabled peers. Declining percentile scores do not necessarily represent a lack of educational benefit; they may show that the child was unable to demonstrate a certain level of academic progress achieved by his non-disabled peers. The fact that the student experienced declining percentile scores in some of the tests does not equate with a lack of educational progress. *Houston Independent School District v. Bobby R. Joyce and CAIUS R.*, 200 F3d 341, (5th Cir. 2000)

Conclusion of Law

Based on a review of all of the evidence, I find that The Greenwood School is an appropriate placement that would offer an appropriate education reasonably calculated to provide a meaningful educational benefit to the student. *Bd. of Educ. of the Hendrick Hudson Central*

Sch. Dist. v. Rowley, 458 U.S. 176, 102 S.Ct. 3034 (1982); *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 114 S.Ct. 361 (1993).

Based on the findings of fact and conclusions of law the following is ORDERED:

1. Judgment is entered in favor of the Parent.
2. The student shall attend The Greenwood School for the 2009-2010 year.
3. The District is responsible for tuition and related expenses for the student's attendance at the Greenwood School.
4. The District shall complete the OT testing to determine whether the student needs OT services and if so provide them at The Greenwood School.
5. The Parent is the prevailing party in this matter.

Dated at Burlington, Vermont this 14 day of September 2009.


Ellen Coogan

NOTICE OF APPEAL RIGHTS

The decision of a hearing officer is final unless appealed to a state or federal court of competent jurisdiction. Parties have the right to appeal the hearing decision by filing a civil action in a federal District court or state court of competent jurisdiction. An appeal from a due process hearing to a court of competent jurisdiction pursuant to 20 U.S.C. § 1415 (i) (2) and (3) (A) shall be commenced within 90 days from the notice of the final decision and not after.